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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

*Civil
Proc I*

FILE: B-190238

DATE: June 15, 1978

MATTER OF: Documentation Associates -- Claim for Proposal Preparation Costs

DIGEST:

1. Claimant of proposal preparation costs contends that contracting agency in bad faith induced claimant to submit offer. Bases for contention were previously bases for untimely protest which were not therefore considered on merits. Claim is denied, since merits may not be considered now merely because they are raised in context of claim.
2. GAO previously determined that contracting agency's inclusion of claimant's unsuccessful proposal in competitive range was improper, since initial proposal was considered "non-competitive." Claimant requests reimbursement for expenses of attending technical discussions and submitting revised offer, which, in view of GAO decision, should not have been incurred. Claim is denied, since record shows no bad faith on part of contracting agency. Expenses incurred in attending debriefing and protest costs may not be paid.

In Documentation Associates, B-190238, March 23, 1978, 78-1 CPD 228, we considered a protest by Documentation Associates against the rejection of its proposal under request for proposals (RFP) No. 2-26363 for library technical processing services, issued by the National Aeronautics and Space Administration (NASA). The proposal was one of two included in the competitive range after an initial evaluation (the other was the incumbent's, Technology Development Corporation (TDC)). Technical discussions were held with both firms, and revised offers were submitted. A further evaluation rated Documentation Associates' proposal slightly lower technically than TDC's. Therefore, and since the cost of the Documentation Associates' proposal far exceeded that of TDC, the contracting officer selected TDC for final negotiation.

In protesting the contracting officer's decision, Documentation Associates argued that it should have been furnished certain material available to TDC as the incumbent contractor; NASA should have procured the required services by use of either the section 8(a) program of the Small Business Act, 15 U.S.C. § 637(a)(1) (1976), or a small business set-aside; and its proposal should not have been rejected on the basis of a high cost proposal without the opportunity to discuss costs.

In our decision, we determined that the issues involving the material furnished the offerors and the type of solicitation used were untimely raised under our Bid Protest Procedures, 4 C.F.R. part 20 (1977) (Procedures), and could not, therefore, be considered on their merits.

Concerning whether cost discussions should have been conducted with Documentation Associates, the record indicated that it was NASA's belief that there was no potential for a significant cost reduction in the proposal--as the source selection official stated, "their cost proposal was noncompetitive." On that basis, and in view of NASA procurement procedures and the language of the RFP regarding discussions and cost, we concluded that Documentation Associates should not have been included in the competitive range. We denied the protest since the firm was not, therefore, prejudiced by the lack of cost discussions. However, since firms should not be included in the competitive range without a reasonable chance for award, we brought the matter to the attention of the Administrator of NASA.

Documentation Associates has now submitted a claim for reimbursement for expenses incurred in preparing its proposal, taking part in discussions, attending a debriefing after the rejection of the proposal, and pursuing the bid protest before our Office. Documentation Associates argues:

"* * * we believe the Government initially acted unreasonably by aggressively soliciting and encouraging a small 8(a) business to compete

against a non-B(a) Incumbent and further aggravated the unfair situation by tailing and refusing to respond to our request for critical information that was only available from the Government or the Incumbent. This pattern of arbitrary and capricious action was maintained throughout the procurement process and is most clearly evident in NASA's admission that our 'noncompetitive' proposal was knowingly and wrongly included in the competitive range without 'any chance for a realistic reduction' * * * similar actions by NASA are certainly 'arbitrary and capricious' and illustrate NASA's failure to act fairly and honestly in this procurement."

Concerning the costs of preparing its initial proposal and attending discussions, in a series of cases beginning with Heyer Products Company v. United States, 140 F. Supp. 409 (Ct. Cl. 1956), the Federal courts have recognized that because bidders and offerors are entitled to have their bids and proposals considered fairly and honestly for award, the preparation costs of a bid or proposal which was not so considered may be recoverable in certain circumstances. Heyer held that recovery could be had only where clear and convincing proof showed a fraudulent inducement of bids. That is, bids were not invited in good faith, but as a pretense to conceal the purpose to award the contract to some favored bidder or bidders, and with the intent to willfully, capriciously, and arbitrarily disregard the obligation to let the contract to the bidder whose bid was most advantageous to the Government. 140 F. Supp., supra, at 414.

Subsequently, the courts have modified the standard set forth in Heyer in order to allow

recovery of preparation costs where the Government's evaluation of bids has been so arbitrary or capricious as to preclude a particular firm from an award to which it was otherwise entitled. McCarty Corporation v. United States, 499 F. 2d 533 (Ct. Cl. 1974); Armstrong & Armstrong, Inc. v. United States, 356 F. Supp. 514 (D.D.C. 1973); see T & H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345. However, as our Office held in Keco Industries, Inc., 54 Comp. Gen. 215 (1974), 74-2 CPD 175, and Federal Leasing Inc., DPZ Incorporated, 54 Comp. Gen. 872 (1975), 75-1 CPD 236, the courts have not indicated that we should deviate from the higher standard of the Heyer decision when a claim for bid preparation costs is based on an agency's action in issuing a solicitation. See Ampex Corporation, RCA Corporation, B-183739, November 14, 1975, 75-2 CPD 304.

To the extent that Documentation Associates' claim is based on its contentions that NASA did not in the first instance in good faith solicit an offer from the firm, the factors upon which that position is based were not initially raised in accordance with the time limits set out in our Procedures. It would not be appropriate to consider their effect here merely because they are raised in the context of a claim for proposal preparation costs. See DWC Leasing Company, B-186481, November 12, 1976, 76-2 CPD 404. Cf. Department of Commerce--Request for Reconsideration, B-186939, December 16, 1977, 77-2 CPD 469.

Thus, we can only consider the merits of the claim from the point of NASA's receipt of Documentation Associates' initial proposal. The issue is, therefore, whether the expenses allegedly incurred by Documentation Associates in attending technical discussions and in preparing and submitting its revised proposal, which our March 23 decision indicates should have been unnecessary, are reimbursable.

Our decisions suggest that such expenses may properly be considered in connection with a claim for proposal preparation costs. See Condur

Aerospace Corporation--Claim for Proposal Preparation Costs, B-187347, July 14, 1977, 77-2 CPD 24; Edmac Associates, Inc., B-184469, January 30, 1976, 76-1 CPD 68; Radiation Systems Incorporated, B-180018, June 12, 1974, 74-1 CPD 322. The standard for review of this claim must be that set forth in Heyer--a claim such as this considered under the modified Heyer standard would always fail because the claimant would not have been the ultimate awardee. See International Finance and Economics, B-186939, October 25, 1977, 77-2 CPD 320.

On the basis of the record before our Office, we believe that the contracting officer's admittedly improper inclusion of Documentation Associates in the competitive range can at worst be characterized as a judgmental error on the side of caution, rather than a pretense to conceal a preconceived intent to award a contract to TDC. As such, and using the Heyer standard, it is not the type of procurement irregularity that would entitle Documentation Associates to recovery of the subject costs incurred as a result thereof. See Morgan Business Associates, B-188387, May 16, 1977, 77-1 CPD 344; Amram Nowak Associates, Inc., B-187253, March 15, 1977, 77-1 CPD 189.

The claim for proposal preparation costs is denied.

In view of the above, there is no basis to reimburse Documentation Associates for expenses incurred in attending its debriefing even if such expenses could be considered proposal preparation costs. In addition, the cost of pursuing a bid protest is in any case noncompensable. See Tennessee Valley Service Company, B-188771, December 8, 1977, 77-2 CPD 442.


Acting Comptroller General
of the United States